TRUSTS — CONFUSION OF TRUST FUNDS — FOLLOWING TRUST RES. — A trustee deposited in a bank to his own credit funds held in trust for the plaintiff. Subsequently he deposited to the same account a second sum, a part of which was his own property and the remainder a trust in favor of one Moors, the proportions not being exactly ascertainable. The trustee afterwards drew upon the account for his own use, thereby reducing it to a sum admittedly less than the interest of Moors. The trustee having become bankrupt, the plaintiff claimed priority on the balance of the account. *Held*, that he cannot trace his trust fund into this balance and must come in with the general creditors. *In re Mulligan*, 116 Fed. Rep. 715 (Dist. Ct., Mass.).

While this result does not seem open to question, the grounds adopted by the court are not altogether clear. Where a trustee mingles trust funds with his own bank account, drafts made by him for his own purposes are, as against the *cestui*, charged to the trustee's share until it is exhausted. *In re Hallett's Estate*, 13 Ch. D. 696. See *National Bank* v. *Conn., etc., Ins. Co.*, 104 U. S. 54. The remainder is then entirely a trust fund, and further drafts by the trustee must, of course, directly affect the beneficiaries. In such cases the law seems settled that, as between the two trust funds, these wrongful drafts are charged to the one first deposited. *In re Hallett's Estate, supra.* See LEWIN, TRUSTS, 10th ed., 1096. The uncertainty regarding the exact amount of Moors' interest should not prevent the application of this rule, since the ultimate balance was less than the sum admittedly due him, and hence the wrongful drafts must have been greater than the petitioner's interest, which would, therefore, be extinguished. It would seem that the decision should have been based expressly on this rule, and the balance held subject to the claim of Moors as *cestui que trust.*

BOOKS AND PERIODICALS.

PROPOSED MODERNIZATION OF THE LAW OF DEFAMATION. — Current dissatisfaction with the present state of the law of slander and libel finds somewhat violent expression in a recent article. *Absurdities of the Law of Slander and Libel*, by James C. Courtney, 36 Am. L. Rev. 552 (July–August, 1902). Mr. Courtney points out the extent to which the modern law on the subject follows the artificial presumptions and harsh rules of the sixteenth century, and urges sweeping statutory changes. He argues that the plaintiff is too greatly favored, and would remedy the situation by compelling him to prove damage affirmatively in all cases, by giving the defendant greater leeway in establishing the substantial truth of his statement, and by allowing the defendant to show by specific instances that the plaintiff did not deserve the reputation alleged to have been injured.

It will be conceded that the law on libel and slander crystallized too early, and that the delay in freeing it from the old arbitrary rules has been unfortunate. Progress, however, has been made. For example, truth is now universally recognized as a complete defence in civil actions. *Haynes* v. *Spokane Chronicle Pub. Co.*, 11 Wash. 503; see ODGERS, LIBEL AND SLANDER, 3d ed., 192. So, too, evidence that the plaintiff's reputation is bad is admissible in mitigation of damages. *Scott* v. *Sampson*, 8 Q. B. D. 491. Such gradual reform has undoubtedly been beneficial, and perhaps further changes are desirable. But the revolutionary legislation proposed by Mr. Courtney seems to err on the side of radicalism as much as does the present law on the side of conservatism.

In discussing the author's first suggestion, that the presumption of damage to the plaintiff be abandoned, it must be admitted that the old line between words actionable *per se* and words requiring proof of special damage was not drawn in accord with twentieth century ideas, and that there has been unfortunate reluctance to change it. But modifications in this, too, have been made, though not always in the direction of increasing the plaintiff's burden; for instance, the charge of unchastity in a woman has been declared actionable *per se*, and thus the worst error has been rectified. To force the plaintiff in every case to prove

special damage would surely be a mere shifting of severity. Damage to reputation may obviously be very real and yet extremely difficult to prove. Furthermore, even though the presumption of damage be allowed, the jury still has control over the amount of the award. Though it will rightly feel that injury will very probably follow certain reports, it will not render exorbitant verdicts where damage does not clearly exist.

The degree of exactness with which the defendant's proof must square with his previous statement in order to sustain the defence of truth cannot be precisely defined in a general rule. It is obviously wise to restrain the careless use of defamatory language. Strictness, however, easily leads to unjust results, as in the Indiana case held up to ridicule by Mr. Courtney, in which a defendant who had alleged that the plaintiff had stolen two animals was not allowed to prove that he had stolen one. *Swann* v. *Rary*, 3 Black. (Ind.) 299. An excellent test has been suggested: "Did the libel as published have a different effect on the mind of the reader from that which the actual truth would have produced?" ODGERS, OUTLINE OF THE LAW OF LIBEL, 99; see *Alexander* v. *North Eastern Ry. Co*, 6 B. & S. 340. This test seems worthy of general adoption.

The suggestion that the defendant should be allowed to prove in mitigation of damages, by specific instances distinct from those detailed in his original statement, that the plaintiff did not deserve the reputation alleged to have been injured, seems most dangerous. It is true that the plaintiff had no right to a reputation he did not deserve, and that this is the real basis for allowing the defence of truth. But where truth is not pleaded, the admission of evidence that the plaintiff's reputation was undeserved would be unfair and unwise. It would compel him to be prepared to defend all his past life, and would afford opportunity for publishing indefinite amounts of libellous matter during the trial itself. There is also the very real, though perhaps exaggerated, danger of confusing the issue by these collateral questions.

In some respects the present law may, as Mr. Courtney charges, operate harshly upon the defendant; to some extent it may foster baseless litigation. But the actual injustice resulting from it seems inconsiderable as compared with the harm that might follow the adoption of the author's extreme views. The wise course would seem to be to strengthen the reform tendency already apparent in the courts, rather than to resort to summary legislation which would impose an undue burden on the plaintiff and remove salutary restraints on careless accusation.

POWER OF LEGISLATURE TO REGULATE MINERS' WAGES. — As a result of the recent coal strike, the proposition has been advanced that the legislature of Pennsylvania has the power to classify the coal mines with reference to the depth and thickness of the veins, to fix schedules of reasonable minimum wages per ton for mining coal, and to impose a penalty upon any operator who may make contracts with miners for less than such wages. *Power of State Legislatures to fix the Minimum Amount of Wages to Coal Miners*, by R. M. Benjamin, 64 Albany L. J. 349 (Oct., 1902). The author supports the proposed legislation as a valid exercise of the police power, and, so far as corporations are concerned, of those powers of amendment which a state possesses over their charters. It would seem that unless it can be defended upon one of these grounds it is in violation of those clauses of the Fourteenth Amendment which forbid the states to "deprive any person of life, liberty, or property without due process of law," or to "deny to any person the equal protection of the laws." It is now settled that "liberty" includes the right to contract. *Allgeyer* v. *Louisiana*, 165 U. S. 578. It is also settled that a corporation is a "person" within the meaning of the Amendment. *Smyth* v. *Ames*, 169 U. S. 466, 526. It seems at the outset at least doubtful whether the proposed legislation is not void as denying the equal protection of the laws. *Gulf, etc., Ry.* v. *Ellis*, 165 U. S. 150.

Granting that the legislation is not open to the objection last stated, can one